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IN THE

Supreme Court of the United States

No. 211

MILLIE VECCHIO, Individually and as Administratrix of the Goods, Chattels and Credits of MARIO VECCHIO, Deceased,

Petitioner,

against

ANHEUSER-BUSCH, INC.,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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No. 211

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Petitioner,

against

ANHEUSER-BUSCH, INC.,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Statement

The petitioner in this case commenced this action in the United States District Court for the Eastern District of New York to recover damages for the wrongful death of her intestate and to recover damages for his conscious pain and suffering. The action for conscious pain and suffering was dismissed by the Trial Court for failure of proof, without opposition, and no appeal was taken therefrom (101a). The issues in the wrongful death action were submitted to the jury, and the jury rendered a verdict in favor of the defendant-respondent. The petitioner then appealed to the United States Court of Appeals for the Second Circuit, which Court affirmed the judgment entered in favor of the respondent. Thereafter, two successive peti-

tions for reargument were presented to and considered by the said Court of Appeals but that Court adhered to its original decision affirming the judgment in favor of the respondent.

This is an action for negligence that arises out of an accident that occurred at the plant of the respondent, Anheuser-Busch, Inc., located in Newark, New Jersey. All parties are in agreement that in accordance with the rule laid down by this Court in the case of *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, the substantive law of the State of New Jersey must be applied.

Jurisdiction of the United States Court is based on the provisions of 28 U.S.C.A., Section 1254, there being diversity of citizenship between the petitioner and the respondent.

Statement of Facts

The respondent, Anheuser-Busch, Inc., was the owner of certain real property located adjacent to U. S. Highways 1 and 9 near Newark, New Jersey. In 1951 there was erected on this property by the defendant a brewery which the respondent has operated ever since in order to supply its products for the eastern market. After the erection of the brewery, the respondent entered into an agreement with Artkraft Strauss Sign Corp., the decedent's employer, for the erection of certain advertising signs on the brewery (67a-69a). This original agreement provided that Artkraft Strauss would place the signs upon the building and would provide service and maintenance for the signs for a specified consideration to be paid by the respondent. According to the original agreement title to the signs was to remain in Artkraft Strauss unless and until the payment of certain monies by the defendant to Artkraft Strauss. The monies provided for were never paid (103a). At the end of the original contract period and in 1956 the parties entered into a second agreement which provided,

in essence, for the further maintenance and care of the particular signs by Artkraft Strauss (112a). The second agreement also provided that title to the signs was to remain in Artkraft Strauss Sign Corp. unless, and until the payment of certain monies by the respondent. The monies provided were never paid (105a).

Plaintiff's intestate was providing maintenance for one of these signs on the day of the accident, April 25, 1960, in the course of his employment to his employer, Artkraft Strauss, when the scaffold upon which he was working fell and caused him to be precipitated to his death. The particular sign involved was commonly referred to as the southerly "A-Eagle". This particular sign was constructed by Artkraft Strauss and then was raised to the roof of the tenth floor of this building where it was then bolted onto iron studs which protruded from the roof of the building. The only evidence in the case indicates that the sign was affixed solely by the means of bolts and that it could be removed by merely unbolting it and lowering it to the ground (76a-77a; 108a; 28a-29a).

Artkraft Strauss, in connection with the sign, also provided a scaffold which was used solely by the workmen of Artkraft Strauss in order to gain access to the sign so that it might be painted and so that other maintenance might be provided. Maintenance for the scaffold was provided by Artkraft Strauss.

The particular scaffold in question was on the front of the sign and extended along the entire length of it. It was supported by two cables of 5/8" thick wire rope which were provided and supplied by Artkraft Strauss. These cables were attached to the metal top of the sign and there were winches on the scaffold itself so that the workmen could move the scaffold up and down to proceed with their work. This scaffold and the cables were placed there in 1951 but were destroyed by a hurricane in 1954 and were replaced at that time by Artkraft Strauss. It remained there until the day of the accident in 1960 (109a).

The particular scaffold was supplied, repaired and serviced and was utilized only by the employees of Artkraft Strauss, and the respondent neither inspected the scaffold, the cables nor the sign. One of decedent's own co-workers even testified that they, employees of Artkraft Strauss, were responsible to inspect the cables and the scaffold, to grease and to oil the winch and the cables, and to otherwise maintain the scaffold (78a-79a).

Regarding the accident, it occurred on April 25, 1960 when the decedent, during the course of his employment with Artkraft Strauss, was working on the scaffold with Mr. Dominick Picone. They were replacing certain of the neon tubes which had burned out. As they were working, the steel cable which supported that side of the scaffold on which the deceased was working, broke, and the deceased was precipitated to his death. Mr. Picone, who was also on the scaffold, was able to grab hold of a cable and to climb off the scaffold. The cause of the accident was the breaking of the cable.

The petitioner produced an engineer who examined the broken cable and he testified that the cable was made of steel and that it had broken because it was heavily corroded (84a-85a). The expert stated that the cause of the break was the failure to protect the cable from corrosion (85a). He pointed out that a ferrous metal, such as this cable, will begin rusting almost immediately when exposed to atmospheric conditions (86a). The failure to grease or oil this cable permitted it to rust to such an extent that it was unable to support the scaffold which caused it to break. The sole cause of the accident was that the cable, which had been in place for six years, rusted and corroded to an extent that it was unable to support the scaffold.

At the trial, the petitioner, basically, presented two theories of liability. The first of these was that there was an obligation under the New Jersey Safety Code to

inspect and to make sure that the cable and the scaffold were fit and in proper condition and also to provide the decedent with safety belts or ropes. The trial Judge rejected this theory as a matter of law, holding there was no obligation upon the defendant to comply with the code requirements, this being solely the duty of decedent's employer. The Court of Appeals unanimously concurred in this determination.

Secondly, petitioner contended that the common law of the State of New Jersey imposed a duty upon respondent. It was upon this theory that the trial court submitted the case to the jury; the jury found respondent breached no duty owed and rendered a verdict in favor of respondent. The Court of Appeals unanimously held that the Court below erred in its charge to the jury. The majority held that plaintiff failed to prove the existence of any duty owed by respondent to petitioner and, hence, the trial Justice should have directed a verdict for respondent. On this basis a new trial was refused.

POINT I

Petitioner was not deprived of the right to a jury trial as guaranteed by the Seventh Amendment to the Constitution.

There was in this case a full and complete trial with a jury in the United States District Court for the Eastern District of New York. At that trial the trial Justice dismissed so much of the petitioner's claims as sought recovery under the theory that the New Jersey Safety Code established a duty to inspect and maintain this scaffold. All the Justices of the Court of Appeals concurred in that holding. The trial Justice submitted to the jury the question as to whether or not there was a common law duty under the law of the State of New Jersey. While the Court of Appeals found that there was error in the charge,

it also found that under the proofs presented by the petitioner, there was no duty owing from the respondent to the petitioner; and, hence, affirmed the judgment awarded in favor of the respondent.

Under this state of facts, we believe that petitioner is erroneous in arguing that she has been deprived of the right guaranteed her by the Seventh Amendment to the Constitution to a jury trial. The Court below has held that, conceding all of the facts proven by this petitioner, the law is that there may be no recovery. While the Seventh Amendment guarantees the right to a jury trial, there remains the function of the Court to determine the law to be applied to a case, it being solely the province of the jury to determine the facts. Upon a demurrer to the evidence, it becomes the function of the Court to determine whether, as a matter of law, there are any facts to be determined by the jury or whether, taking the most favorable interpretation of all the evidence, the plaintiff has failed to prove a case. In the event that the petitioner has failed to prove a case, it is clear that the complaint must be dismissed. As was stated by this Court in the case of *Galloway* v. *United States*, 319 U. S. 372, 389: "If the intention is to claim generally that the amendment deprives the Federal Courts of power to direct a verdict for insufficiency of evidence, the short answer is that the contention has been foreclosed by repeated decisions made here consistently for nearly a century." Even the dissenting opinion in the *Galloway* case observed that it was necessary for a plaintiff to present some testimony supporting the case.

The situation here is that the Courts below have ruled that there was no duty as a matter of law owed by the respondent to the petitioner's intestate. "* * * It has been the doctrine of this Court that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence,

but whether there is any upon which a jury can properly proceed to find a verdict. * * *" *Coughran* v. *Bigelow*, 164 U. S. 301, 307. In this case the Courts have found that there was no evidence of any sort to support a verdict, the petitioner having failed to establish the existence of any duty owed by the respondent. Under such circumstances, there has been no deprivation of the right to a trial by jury.

POINT II

The Court of Appeals did not err in failing to grant a new trial.

The petitioner in this case raises a novel question with regard to the interpretation of Rule 50 of the Rules of Civil Procedure. Here, the respondent moved for dismissal of the complaint and for a directed verdict at the conclusion of the plaintiff's case and at the conclusion of the entire case. These motions were denied and the issues were submitted to the jury. After the rendition of a verdict for the respondent, no motions were made by respondent for a directed verdict, since it had received a verdict from the jury. Upon appeal, the Court of Appeals held that the trial judge had committed error in his charge; this being the sole error found by the Court of Appeals or claimed by the petitioner. However, the Court of Appeals originally, and through two successive petitions for reargument, held that it would not grant a new trial since the lower court also erred in failing to dismiss the complaint as a matter of law. Petitioner argues that the Court of Appeals was powerless under Rule 50 to do anything except grant a new trial since the respondent did not make the meaningless gesture of moving for judgment notwithstanding the verdict after it had received a verdict.

All of the cases cited by petitioner in her petition are not in point on this issue. In all of them, it was the ap-

pellant who had failed to move for a directed verdict and who was seeking a modification of the judgment below. For example, in the case of *Dunlap Tyre & Rubber Corp. v. Thompson*, 273 F. 2d 369, the plaintiff won a verdict but the amount of that verdict was reduced by the amount of a verdict in favor of the defendant on a counterclaim. With respect to the verdict on the counterclaim, the plaintiff made no motions for judgment notwithstanding the verdict, and upon appeal by the plaintiff, the Court of Appeals was clearly correct in holding that under Rule 50, it could not direct the entry of a judgment dismissing the counterclaim. Neither the *Dunlap* case nor the other cases cited are the same, or even similar, to the instant situation.

Rule 50 (as amended in July, 1963) presents detailed rules as to when a party must move for a directed verdict. In point here is the admonition that after the verdict a party may move within ten days to have any judgment set aside and to have judgment entered in accordance with the motion for a directed verdict. Necessarily, this rule pre-supposes that a party wishes the judgment to be changed and seeks some relief other than the entry of the same judgment that has already been entered. In this particular case, at the conclusion of the trial, judgment was entered in favor of the respondent. What would be the point of a motion for the direction of the entry of judgment notwithstanding the verdict when respondent received a verdict and judgment was entered for it? Clearly, such a motion is not directed by the rule and cannot be made.

Further, we believe that the petitioner completely overlooks the fact that something must be shown to entitle a party to a new trial. Under petitioner's argument, she would obtain a new trial, would come forward and present her facts again, the respondent would move for a directed verdict, and the Court would be bound to grant that motion.

This is relitigation without purpose. To be entitled to a new trial, a party must show some grounds as to why there should be a new trial. As was stated by the Court in the case of *Campbell* v. *Clark*, 271 F. 2d 578, 579: "The sound exercise of judicial discretion may be tested by consideration of whether or not the grounds advanced for a new trial make it reasonably clear that substantial justice has not been done and that a new trial would not constitute relitigation." Under the argument advanced by petitioner here, the granting of a new trial would merely constitute relitigation and would be a burden and a time-consuming process without any purpose whatsoever. We believe that there is nothing in Rule 50 that ever intended such a result and that the respondent did not have to make the meaningless gesture of moving, after judgment was entered, for the entry of the very same judgment.

POINT III

The Court of Appeals correctly ruled that there was no duty owing from respondent to the deceased.

Upon the merits, the petitioner seeks leave of this Court to have it review the determination of the Court of Appeals as to whether or not under the law of the State of New Jersey, both statute and common, the respondent owed any duty to the deceased. The sole issue to be determined is what the law of New Jersey is and its application to this particular case.

The petitioner in this case presented several theories of liability. The first of these theories was that under the New Jersey Safety Code, there was a duty on the part of the respondent to comply with the provisions of the Safety Code and to insure that the scaffold, from which the deceased was precipitated, was safe. The Trial Court and all of the Judges of the Court of Appeals have agreed that, as interpreted by the Courts of the State of New

Jersey, the respondent did not have to comply with the provisions of the Safety Code and could not be held liable for failure to do so. Under Section 34:5—161, N.J.S.A., the obligation to comply with the Safety Code is placed upon "Any manager, superintendent, owner, foreman, or any person in charge of any building, construction, or any place." In interpreting the statutory language, however, the New Jersey Courts have placed emphasis on the words "person in charge" and have refused to apply the Code's requirements to persons who are not in control of the work. *Gibilterra* v. *Rosemawr Homes, Inc.*, 19 N. J. 166; *Trecartin* v. *Mahoney-Troast Construction Co.*, 18 N. J. Super. 380. Under the undisputed facts of this case, the work was being performed by the plaintiff and his co-employees and the respondent was in no way in control. The *Gibilterra* case appears to be in point to the instant situation. In that case the defendant was the owner and developer of a tract of homes and had a contract with one Velone to install certain plumbing work and fixtures and to connect water mains from the houses to the sewers. In order to connect the water, a trench was dug from the house to the main. The Safety Code required the installation of shoring or sheeting to protect workmen in the trench. This was not provided. The work itself had been performed by Velone, with no control over the work itself being exercised by the defendant. Under the facts, the New Jersey Court held that it was proper to dismiss the complaint stating that the duty to comply with the Safety Code was imposed solely upon the person in charge of the work and that, since the defendant was not, it could not be held for a violation of the Code. The same reasoning applies to this case and the Courts below were clearly correct in holding that there was no obligation on the part of the respondent to comply with the Safety Code.

Secondly, petitioner urges the existence of a common law duty. This contention is that respondent, as owner of the premises upon which petitioner's decedent was

working, breached its duty to furnish decedent, an invitee workman, with a safe place to work.

The respondent had contracted with the decedent's employer, Artkraft Strauss, for the latter to install a neon sign on the premises owned by respondent. The agreements also provided for complete maintenance and repair of the sign by Artkraft Strauss. In connection with the sign, Artkraft Strauss also put up a scaffold in order that the repair work and maintenance of the sign might be accomplished. The complete maintenance of the sign and scaffold was performed solely and wholly by the employees of Artkraft Strauss. There was no evidence showing, in any way, that respondent controlled, or directed the maintenance of the scaffold or the sign or that the respondent, in any way, went on or near to the sign or scaffold.

While the decedent was working on the scaffold, one of the cables of the scaffold broke and precipitated him to his death.

The scaffold had been installed in 1951 but had been destroyed by a hurricane in 1954. At that time it had been replaced by the decedent's employer and had been in place up until the time of the accident in 1960. The cable which broke was composed of steel and the experts stated that it rusted through. The cable, like most other steel, would begin to rust upon being exposed to the atmosphere. In order to retard the corrosion, oil or grease would be applied to the cable, this being done by employees of Artkraft Strauss. The maintenance and inspection of the cable was, at all times, performed by Artkraft Strauss. It further appeared that the particular portion of the cable that broke had not been greased or oiled as had the rest of the cable.

Under the law of the State of New Jersey, it seems settled that one who engages an independent contractor to

work for him and who does not interfere with or direct that work is not obligated to protect the employees of the independent contractor from hazards which are incidental to or a part of the very work which the independent contractor has been hired to perform.

Gibilterra v. *Rosemawr Homes, Inc.*, 19 N. J. 166;
Broecker v. *Armstrong Cork Co.*, 128 N. J. L. 3;
Wolczak v. *National Elec. Prods. Corp.*, 66 N. J. Super. 64;
Jensen v. *Somerset Hospital*, 58 N. J. Super. 204, certification denied, 31 N. J. 551;
Mergel v. *Colgate-Palmolive-Peet Co.*, 41 N. J. Super. 372;
Trecartin v. *Mahony-Troast Const. Co.*, 18 N. J. Super. 380.

In this case, the respondent had contracted with the deceased's employer to provide complete maintenance for the sign. The contract covered the servicing of the sign and also the scaffold and cables by which the men got up onto the sign in order to service it. The deceased and his co-workers inspected the scaffold and, inspected and greased the cable. One of the hazards of working on that particular scaffold was that it was not safe unless the cable was maintained in proper order. The respondent had entered into a contract with the deceased's employer to properly service the scaffold and the cable. Under the law of the State of New Jersey, the hazards which are incidental to the work of an independent contractor may not form the basis for liability as against the owner. The Court below was correct when it held that under these facts, there was no duty to petitioner's decedent under the law of the State of New Jersey.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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